RAILROADS — LIABILITY FOR DAMAGE TO ANIMALS — CATTLE RUNNING AT LARGE. — The plaintiff's horse was killed by one of the defendant's trains in a district where cattle might lawfully run at large. The jury found that the train was operated negligently, and that cattle were reasonably to be expected upon the unenclosed right of way. *Held*, that the plaintiff may recover. *Houston, etc. R. Co.* v. *Garrett*, 160 S. W. 111 (Tex.).

Many states in the South and West have held inapplicable to their conditions the common-law rule which required the owner of cattle to keep them at his peril from trespassing upon the land of another. *Wagner* v. *Bissell*, 3 Ia. 396; *Pace* v. *Potter*, 85 Tex. 473, 22 S. W. 300. See INGHAM, LAW OF ANIMALS, 265 *et seq.* In these jurisdictions, in the absence of local regulations, the owner of cattle is not liable for their trespasses on unenclosed lands. *Morris* v. *Fraker*, 5 Colo. 425. But it is well settled that cattle have no affirmative right to graze upon such lands. *Harrison* v. *Adamson*, 76 Ia. 337, 41 N. W. 34. It is also generally agreed, contrary to the assumption of the principal case, that although their owner is relieved from liability, the cattle are still trespassers for purposes of determining the landowner's obligations. *Beinhorn* v. *Griswold*, 27 Mont. 79, 69 Pac. 557; *Corbett* v. *Great Northern Ry. Co.*, 19 N. D. 450, 125 N. W. 1054. *Cf. Hurd* v. *Lacy*, 93 Ala. 427, 428, 9 So. 378. The landowner, therefore, is not bound to keep his premises in safe condition for cattle running at large. *Herold* v. *Meyers*, 20 Ia. 378; *Hughes* v. *Hannibal, etc. R. Co.*, 66 Mo. 325. But even to trespassing animals the landowner owes a duty not to inflict intentional harm. *Campbell* v. *Great Western Ry. Co.*, 15 U. C. Q. B. 498. He owes a further duty to exercise reasonable care to avoid active injury to them after their presence is discovered. *Herrick* v. *Wixom*, 121 Mich. 384, 81 N. W. 333. *Contra, Maynard* v. *Boston & Maine R. Co.*, 115 Mass. 458. Many courts extend this duty to situations where the presence of trespassers is reasonably to be anticipated. *Bullard* v. *Southern Ry. Co.*, 116 Ga. 644, 43 S. E. 39; *Whelan* v. *Baltimore & Ohio R. Co.*, 70 W. Va. 442, 74 S. E. 410. For the same reasons of policy that dictated the repudiation of the common-law rule of liability for trespassing animals, this latter view is peculiarly suitable in states devoted to grazing, and its application to the facts of the principal case would justify the decision even though the animal was trespassing.

SALES — ESSENTIAL ELEMENTS OF SALE — MUTUUM: WHETHER A SALE WITHIN LOCAL OPTION LAWS. — The defendant was convicted of selling liquor in prohibition territory. The alleged purchaser secured a quart of whiskey from him which he later repaid by returning a like quantity. *Held*, that the judgment be affirmed. *Veach* v. *State*, 159 S. W. 1069 (Tex. Crim. App.).

The transaction in the principal case is a *mutuum*, the exchange of one chattel for another of similar nature. It is not a bailment, for under the common-law view the transferee acquires title when his obligation is not to return the specific thing but one like it. *South Australian Ins. Co.* v. *Randell*, 6 Moore's P. C. N. S. 341; see *Foster* v. *Pettibone*, 7 N. Y. 433, 435. It is true that a bailment can be created without a right to regain the specific article, provided some continuous right *in rem* is retained, as where grain is mingled in a common mass in a warehouse. *Ledyard* v. *Hibbard*, 48 Mich. 421. But in the principal case the defendant transferred the whiskey outright and retained no such right *in rem*. Granting, then, that there was a transfer of property by the defendant, the question remains whether it was a sale within a statute providing punishment for "whoever shall sell intoxicating liquor." TEXAS PENAL CODE, Art. 402. Such has been held a sale in Massachusetts. *Howard* v. *Harris*, 8 Allen (Mass.) 297. A later civil statute in Texas making it illegal to "sell, exchange, or give away" liquor in dry territory supports the above interpretation of the criminal statute. SAYLE'S TEXAS CIVIL STATUTES, Art. 3396. Barter is likewise held a sale within the Statute of Frauds. *Franklin* v. *Matoa Gold Min.*

Co., 158 Fed. 941. A transfer of personalty for other personalty than money may not constitute a sale for every purpose. See *Thornton* v. *Moody*, 24 S. W. 331, 333 (Tex.). But the sort of transaction indulged in by the defendant in the principal case falls within the intended prohibition of the local option laws, and the decision seems correct.

STATUTE OF FRAUDS — SUFFICIENT MEMORANDUM — SIGNED BY DEFENDANT ONLY. — The memorandum of a contract for the sale of grain was signed by the vendor, but not by the vendee, who seeks to enforce it. The Idaho statute of frauds provides that such an "agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent." REV. CODES, IDA., § 6009. *Held*, that the plaintiff, not having signed himself, may not recover. *Kerr* v. *Finch*, 135 Pac. 1165 (Ida.).

Both this decision and the one it follows are admittedly against the great weight of authority. *Kerr* v. *Finch*, *supra*, 1165; *Houser* v. *Hobart*, 22 Ida. 735, 127 Pac. 997. The provision in question is practically § 17 of the Statute of Frauds (St. 29 Car. II, c. 3). The same question arises where it is sought to charge a vendee when he but not the vendor has signed. *Old Colony R. Corp.* v. *Evans*, 6 Gray (Mass.) 25; *Mason* v. *Decker*, 72 N. Y. 595; so too where the subject matter is realty. *Hodges* v. *Kowing*, 58 Conn. 12, 18 Atl. 979; *Richards* v. *Green*, 23 N. J. Eq. 536. The overwhelming majority of cases construes the "party charged" to mean the one sued on the agreement. *Schneider* v. *Norris*, 2 M. & S. 286; *Bristol* v. *Mente*, 79 N. Y. App. Div. 67, affirmed 178 N. Y. 599; *Morrison* v. *Browne*, 191 Mass. 65, 77 N. E. 527; *Harper* v. *Goldschmidt*, 156 Cal. 245, 104 Pac. 451. Idaho and Michigan, however, find a fatal want of mutuality under these circumstances. *Houser* v. *Hobart*, *supra*; *Wilkinson* v. *Heavenrich*, 58 Mich. 574, 26 N. W. 139. This view patently overlooks the fact that the statute concerns the proof, and not the existence, of the bargain, for the memorandum does not constitute the contract, but only evidences it. *Thayer* v. *Luce*, 22 Oh. St. 62; *Charlton* v. *Columbia Real Estate Co.*, 67 N. J. Eq. 629, 60 Atl. 192. The court here, indeed, asserts that the local statute has changed the substantive law in this respect also. But it is submitted that the use by the legislature of words already construed almost everywhere to have a certain meaning, shows an intent to use the words in that sense. *Ryalls* v. *Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766. See *Rhoads* v. *Chicago & Alton R. Co.*, 227 Ill. 328, 334, 81 N. E. 371, 373. The court's argument, that it is unjust to allow the holder of a signed memorandum to insist on or deny the contract as he chooses, should be addressed rather to the legislature.

TENANCY IN COMMON — CO-TENANT'S LIEN INFERIOR TO A PRIOR MORTGAGE LIEN. — Prior to a partition suit by one tenant in common the other co-tenant mortgaged his undivided share. *Held*, that the mortgagee's lien on this undivided share of the land was superior to the co-tenant's lien on that share for his portion of the rents and profits collected. *Knecht* v. *Knecht*, 58 Oh. L. Bull. 680.

A tenant in common holds the legal title to an undivided share of the property. See 1 TIFFANY, REAL PROPERTY, § 163. Consequently a mortgage by one will attach only to the mortgagor's undivided share. See *Bigelow* v. *Topliff*, 25 Vt. 273, 286. It is unsettled whether one co-tenant has a lien for rents and profits on the other co-tenant's share of the land. Some courts deny any lien whatsoever. *Vaughan* v. *Langford*, 81 S. C. 282, 62 S. W. 316; see cases collected in 17 AM. & ENG. ENCYC. 697. But, on the other hand, a few jurisdictions do recognize an equitable lien. *Hannan* v. *Osborn*, 4 Paige (N. Y.) 336; *Beck* v. *Kallmeyer*, 42 Mo. App. 563; *Arnett* v. *Munnerlyn*,